80-711

No.

Supreme Court, U. S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RITTENHOUSE CONSULTING ENTERPRISES, LTD.
SEVERANCE ADMINISTRATORS, INC.,
Petitioners

v.

NEW JERSEY STATE COMMISSION OF INVESTIGATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOEL HARVEY SLOMSKY, ESQUIRE
2400 Two Girard Plaza
Philadelphia, PA 19102
(215) LO 8-6188

Attorney for Petitioners
Rittenhouse Consulting
Enterprises, Ltd.
Severance Administrators,
Inc.

QUESTIONS PRESENTED

a) Whether an Order denying a motion of a state agency seeking access to records in the custody of a federal grand jury without such agency making any showing of "particular need" or "compelling necessity" is a final appealable order under 28 U.S.C. Section 1291?

b) Whether a state agency seeking access to business records in the custody of a federal grand jury has the burden of showing that disclosure of such business records outweighs the public interest in secrecy in accordance with United States v. Proctor and Gamble Company, 356 U.S. 677(1958), and Dennis v. United States, 384 U.S. 855(1966)?

PARTIES TO THE PROCEEDING

1) Rittenhouse Consulting Enterprises, Ltd. and Severance Administrators, Inc.

(Petitioners)

2) New Jersey State Commission of Investigation

(Respondent)

3) United States of America

TABLE OF CONTENTS

		Page
1.	Questions Presented	i
2.	Parties to the Proceeding	i
3.	Opinions Below	1
4.	Statement of Jurisdiction	2
5.	Statutory Provisions Involved	2
6.	Statement of the Case	4
7.	Reasons for Allowance of the Writ of Certiorari	
	a. The Court of Appeals Below Has Rendered A Decision on the Appealability of an Order under 21 U.S.C. Section 1291 That Is In Conflict With The Decision of Another Federal Court Of Appeals On The Same Matter and In Conflict With The Applicable Decisions of This Court.	9
	b. The Court of Appeals Below Has Decided An Important Question of Federal Law That Is In Conflict With Applicable Decisions of This Court.	14
8.	Conclusion	17
9.	Appendices:	
	Appendix "A" - Opinion and Order of the U.S. Court of Appeals for the Third Circuit dated September 19, 1980.	18

Page

Appendix "B" - Memorandum Order of the U.S. District Court for the Eastern District of Pennsylvania dated December 5, 1979. 28

TABLE OF CITATIONS

CASES:	Page
Cobbledick v. United States, 309 U.S. 323(1940).	10
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541(1949).	10
Dennis v. United States, 384 U.S. 855 (1966).	i, 14
Douglas Oil Co. v. Petrol Stops Northwest, 411 U.S. 211(1979).	14, 15
In Re Grand Jury Proceedings, 580 F.2d 13(1st Cir. 1978).	12
Perlman v. United States, 247 U.S. 7 (1918).	10
Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395(1959).	6, 12, 15
United States v. Proctor & Gamble Co., 356 U.S. 677(1958).	i, 6, 12, 15

OTHER AUTHORITIES:	
28 U.S.C. Section 1291	2
Federal Rules of Criminal Procedure 6(e)	2-4, 11

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RITTENHOUSE CONSULTING ENTERPRISES, LTD.
SEVERANCE ADMINISTRATORS, INC.,
Petitioners

v.

NEW JERSEY STATE COMMISSION OF INVESTIGATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO REVIEW THE JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT IN
NO. 80-1065

OPINION BELOW

The Opinion and Order of the Court of Appeals dated September 19, 1980 vacating the Order of the District Court is attached hereto as Appendix A. The Memorandum Order of the District Court dated December 5, 1979 is attached hereto as Appendix B. Neither the

Opinion of the Court of Appeals nor the Memorandum Order of the District Court has yet been reported.

STATEMENT OF JURISDICTION

The Opinion and Order of the Court of Appeals vacating the Order of the District Court was filed on September 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 1291:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 6(e), Federal Rules of Criminal Procedure, provides in part:

> (e) Secrecy of Proceedings and Disclosure. (1) General Rule. A grand juror, an interpreter, a stenographer,

an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to --

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) When permitted by a court at the request of the defendant, upon showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

The New Jersey State Commission of Investigation (Commission) sought access to records of Rittenhouse Consulting Enterprises, Ltd. (Rittenhouse) and Severance Administrators, Inc., (Severance) that were in the possession of a federal grand jury empanelled in the Eastern District of Pennsylvania. The Commission is a legislative investigatory body created under N.J.S.A. 52:9M-1 et seq., and is empowered to conduct inquiries in connection with the faithful execution and effective enforcement of the state laws. The Commission is empowered to subpoena witnesses and documents. N.J.S.A. 52:9M-12(c).

The Commission was engaged in the investigation of the New Jersey dental care plans. On July 27, 1979, the Commission issued subpoenaes

to Rittenhouse and Severance for its business records for the period January 1, 1976 through June 30, 1979. The two companies partially complied with the subpoena by providing the Commission with records for the period January 1, 1978 to June 30, 1979. As for the remainder of the records, however, Rittenhouse and Severance informed the Commission that they could not comply because the records for January 1, 1976 through December 31, 1977 had previously been subpoenaed by and were in the custody of the federal grand jury empanelled in the Eastern District of Pennsylvania.

On September 11, 1979, the Commission filed a Motion for Disclosure of the Business Records of Rittenhouse and Severance for the period January 1, 1976 through December 31, 1977 with the United States District Court for the Eastern District of Pennsylvania. The Department of Justice Strike Force supervising the grand jury investigation did not oppose the motion. Petitioners Rittenhouse and Severance objected to the request for access to the records and

contended that the grand jury materials were protected by the secrecy requirement governing grand jury proceedings.

On December 5, 1979, the United States District Court for the Eastern District of Pennsylvania denied the disclosure motion on the ground that the commission had failed to make a showing of "particular need" or "compelling necessity" required to overcome the policy of grand jury secrecy. In making this ruling, the District Court relied upon Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400(1959) and United States v. Proctor & Gamble Co., 356 U.S. 677, 682(1958). The Commission appealed the order of December 5, 1979 to the United States Court of Appeals for the Third Circuit.

On September 19, 1980, the United States Court of Appeals issued an opinion in which the Order of the District Court was vacated and the matter remanded for further proceedings consistent with the opinion of the court. The Third Circuit held that the policy of grand jury

secrecy embodied in Rule 6(e), Federal Rules of Criminal Procedure, is not absolute and that the Rule was not intended to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. In other words, the mere fact that a particular document is reviewed by a grand jury does not convert it into a "matter occurring before the grand jury" within the meaning of Rule 6(e) or implicate the policy of grand jury secrecy.

The Third Circuit assumed that the investigation of the Commission was "unrelated" to the subject matter of the investigation of the grand jury. Thus, the Third Circuit held that once the Commission demonstrated a legitimate purpose flowing from its investigatory authority for subpoenaeing the records of Rittenhouse and Severance, disclosure should not be denied simply because a grand jury had reviewed the documents in an "unrelated" matter. The Court held that access to the records should be refused only if it would compromise the secrecy

of the grand jury. The Court of Appeals placed the burden upon the party objecting to the production of the business records to prove that the policy of grand jury secrecy would be jeopardized by disclosure of the records to the party seeking access to them. The Court ignored the fact that at no time did the Commission establish to the satisfaction of the District Court that a "compelling necessity" of "particular need" existed for their access to the records.

Because the records before them did not include the documents sought by the Commission, the Third Circuit concluded that the District Court was required to evaluate whether the disclosure of the business records would reveal "matters occurring before," or the content of, the grand jury proceedings. If the District Court specifically found that the secrecy policy of Rule 6(e) is implicated, only then should the Commission be required to show a "particular need" or "compelling necessity" for disclosure.

Believing that the Order of December 5, 1979 denying access by the Commission to the business records of Rittenhouse and Severance is not an appealable order and that the Court of Appeals erred in placing the burden of showing a violation of the policy of grand jury secrecy upon the party objecting to the production of the grand jury records, Rittenhouse and Severance have filed the instant Petition for Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

a. The Court of Appeals Below Has Rendered A Decision On The Appealability of an Order Under 28 U.S.C. Section 1291 That Is In Conflict With The Decision of Another Federal Court of Appeals On The Same Matter And In Conflict With the Applicable Decisions of This Court.

An Order of the district court is appealable to the Court of Appeals only if it is a final order under 28 U.S.C. Section 1291, or if not a final order, fits within the "collateral order" exception to the finality requirement as recognized in Cohen v. Beneficial

Industrial Loan Corp., 337 U.S. 541(1949).

Here, the Third Circuit held that the Commission's motion was independent of the grand jury proceedings and that the Order of the district court was a final order because it was entered in an "independent, plenary proceeding that conclusively resolved the only controversy between the parties."

This conclusion is not supported factually by the record in this case nor does it conform to earlier pronouncements of this Court in Perlman v. United States, 247 U.S. 7(1918) and Cobbledick v. United States, 309 U.S. 323 (1940), which held essentially that an order is final only if other avenues of review are unavailable to the party opposing the court order. In Cobbledick v. United States, supra, this Court held that an order denying a motion to quash a subpoena duces tecum was not a final appealable order because the party subpoenaed had the option to disobey the subpoena and be held in contempt. In Perlman v. United States,

supra, this Court further held that an order denying a motion for production of documents before a grand jury was a final, appealable order because Perlman had no other means "to avert the mischief of the order."

In this case, the Commission had available other avenues of review. The Order of the district court of December 5, 1979 was at best a tentative order. It contained the implicit invitation of the district court for the Commission to refile a motion setting forth "particular need" or "compelling necessity" for disclosure and establishing that the Commission's investigations were intended to culminate in a judicial proceeding. Rule 6(e)(3)(c)(i), F.R. Crim. P.

The Third Circuit's holding on appealability in the instant matter is predicated on the assumption that the Commission's reasons for seeking access to the records are unrelated to the substance of the grand jury's investigation. No evidence in the record supports this assumption. If the Commission had met

its burden of establishing "compelling necessity" or "particular need" for the records, under Pittsburgh Plate Glass Co. v. United States. supra, and United States v. Proctor & Gamble Co., supra, then the district court, in exercising its broad discretion over these matters, could have made proper inquiry of the Commission and the Department of Justice attorney handling the grand jury investigation as to whether the Commission's reasons for seeking access to the records relate to the substance of the investigation or the content of grand jury proceedings.

Unlike the Third Circuit, the First Circuit has held that orders denying motions for access to grand jury proceedings are non-appealable. See In Re Grand Jury Proceedings, 580 F.2d 13(1st Cir. 1978). In that case, a state investigator, who had probed the same charges, sought access to the entire proceedings of the grand jury, so that he could assist that body. It is undeniable that the order appealed from was integral to the ongoing grand

jury investigation. Here, the order denying the Commission's motion for disclosure of the subpoenaed records might also be integral to the grand jury proceeding. If the district court was given particular reasons why the Commisssion needed the records and more information by the Department of Justice attorney handling the grand jury, it might have revealed that an ongoing investigation will in fact be interrupted, even for a few days.

A showing of "compelling necessity" or "particular need" is an integral part of the decision-making process of the district court in determining whether to release grand jury records. Whether the showing of need should be less in the case of business records is not an issue here. In this matter, the party seeking access to the records, the Commission, made no showing of "particular need" or "compelling necessity." For all these reasons, the order denying access to the records subpoenaed by the grand jury is nonappealable.

b. The Court of Appeals Below Has Decided An Important Question of Federal Law That Is In Conflict With Applicable Decisions Of This Court.

The Court below held, inter alia, that where the documents in the custody of a federal grand jury are sought for use in an investigation into a different subject than the matter before the grand jury, the party objecting to production must first prove that the policy of grand jury secrecy would be jeopardized. The court below cited no authority for this new and novel distribution of the burden of proof of establishing violations of grand jury secrecy. The burden here should have been upon either the Commission as the party seeking the subpoenaed records or the Department of Justice attorney, who had no objection to the release of the records and is the protector of grand jury secrecy.

The precedent of this Court has always placed the burden on the party seeking disclosure. Douglas Oil Co. v. Petrol Stops Northwest, 411 U.S. 211(1979); Dennis v. United

States, 384 U.S. 855(1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395(1959); and United States v. Proctor & Gamble Co., 356 U.S. 677(1958). In the Douglas Oil Co. case, supra, at 222-223, the Court summarized the well-established law as follows:

> "From Proctor & Gamble and Dennis emerges the standard for determining when the traditional secrecy of the grand jury may be broken: Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed... .
>
> It is clear from Proctor & Gamble and Dennis that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of deomonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification..." (Footnotes and citations omitted)

Although the above cases dealt with grand jury transcripts, as opposed to business records in the custody of the grand jury, the same rule

should apply in both situations. The grand jury subpoenaed the records in conjunction with a specific investigation. At this point, it should be presumed that the records have been used in some fashion to assist the grand jury in its inquiry. Thus, release of the records, like the release of transcripts, will involve to some degree jeopardy to grand jury secrecy.

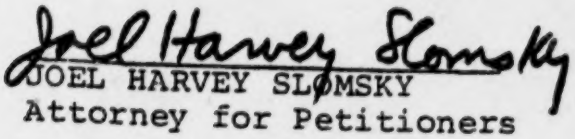
The Commission should have the burden of simultaneously establishing a particular need for the records along with the fact that grand jury secrecy will not be violated. Only in this manner will the district court be in a position to properly weigh the competing interests involved in determining whether the request for numerous business records covering a two year period is structured to cover only records so needed.

Consequently, the court below erred in placing the burden in the first instance on petitioners to prove that the policy of grand jury secrecy would be jeopardized.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



JOEL HARVEY SLOMSKY
Attorney for Petitioners

October, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1065

IN RE:
GRAND JURY INVESTIGATION

New Jersey State Commission
of Investigation,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Misc. No. 79-0555

Argued July 7, 1980
Before: SEITZ, *Chief Judge* and ADAMS, *Circuit Judge*
and KUNZIG, *Judge**

(Filed September 19, 1980)

MICHAEL R. SIAVAGE
Executive Director
State of New Jersey
Commission of Investigation
Trenton, New Jersey 08608

JOEL HARVEY SLOMSKY (Argued)
Philadelphia, Pa. 19102

Attorney for Appellees
Rittenhouse Consulting Enterprises, Ltd.
and Severance Administrators, Inc.

Of Counsel
PETER M. SCHIRMER (Argued)
Attorneys for Appellant

---

* Honorable Robert L. Kunzig, United States Court of Claims, sitting by designation.

OPINION OF THE COURT

ADAMS, *Circuit Judge*.

This is an appeal from the denial of a motion brought by the New Jersey State Commission of Investigation (Commission) seeking access to records of Rittenhouse Consulting Enterprises, Ltd. (Rittenhouse) and Severance Administrators, Inc. (Severance) that are in the possession of a federal grand jury. The first issue we must address is whether the district court's order is a "final decision" reviewable under 28 U.S.C. §1291. The second question raised by this appeal is whether the grand jury secrecy rule, F. R. Crim. P. 6(e), is applicable to the Commission's request for disclosure of documents that are in the custody of the grand jury.

I. STATEMENT OF THE CASE

The New Jersey State Commission of Investigation, a legislative investigatory body created under N.J.S.A. 52:9M-1 et seq., is empowered to conduct inquiries in connection with the faithful execution and effective enforcement of the state's laws. In order to carry out its duties, the Commission is endowed with the authority to subpoena witnesses and documents. N.J.S.A. 52:9M-12(c).

In the course of investigating New Jersey dental care plans, the Commission on July 27, 1979 subpoenaed the books and records of Rittenhouse and Severance for January 1, 1976 through June 30, 1979. The two companies partially complied with the subpoena by providing the Commission with records for the period January 1, 1978 to June 30, 1979. As for the remainder of the subpoenaed items, however, Rittenhouse and Severance informed the Commission that they could not comply because the records for January 1, 1976 through December 31, 1977 had previously been subpoenaed by and were in the custody of a federal grand jury

empanelled in the Eastern District of Pennsylvania. Because documents in the possession of a grand jury are considered records of the court, it was necessary for the Commission to move before the United States District Court for the Eastern District of Pennsylvania to obtain access to the records. Although the motion for disclosure, filed September 11, 1979, was framed under F. R. Crim. P. 6(e),[1] it averred that the documents should be made available because they were not subject to the secrecy policy of the Rules. The United States Attorney su-

---

1. Rule 6(e), F.R.Crim.P., provides in part:

(e) Secrecy of *Proceedings* and Disclosure. (1) General Rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosre is made under paragraph (2)(A)(ii) of this subdivision *shall not disclose matters occurring before the grand jury*, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(emphasis added).

pervising the grand jury did not oppose the motion. Rittenhouse and Severance, however, objected to the request for access,[2] and contended that the grand jury materials must be shrouded in secrecy because the request fits none of the exceptions to the general policy of nondisclosure set forth in Rule 6(e)(2).

On December 5, 1979, the district court denied the disclosure motion on the ground that the Commission had failed to make the showing of "particular need" or "compelling necessity" required to overcome the policy of secrecy encompassed by Rule 6(e). *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

The Commission contends that the district judge erred in basing the denial of the motion on Rule 6(e) because the documents are not "matters occurring before the grand jury" within the meaning of the Rule. In de-

---

2. Although there is some question whether Rittenhouse and Severance have standing to argue against disclosure, since the government, which is the custodian of the records and protector of grand jury secrecy, had no objection to access, the parties neither raised this issue in the district court nor argued it on appeal. It is the policy of this Court to refrain from considering points not pressed by the parties unless the issue either goes to our jurisdiction or is of constitutional dimension. *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976). Our jurisdiction is affected only when the standing problem in a particular case implicates the constitutional aspects of the standing doctrine, namely, whether the dispute is presented in an adversary context and in a form capable of judicial resolution. There are also prudential policy considerations that bear on the question of standing, however, which are not necessarily derived from the Constitution. See *American United for Separation of Church and State, Inc. v. HEW*, 619 F.2d 252 (3d Cir. 1980). In this case, a concrete controversy clearly is presented, and thus the standing problem involves only the prudential consideration whether appellees are the proper parties to defend the decision reached by the district court. Accordingly, following the policy set forth in *Dansker*, there is no occasion in the present situation to address the question of standing.

fending the decision by the district court, Rittenhouse and Severance first challenge our jurisdiction over the appeal. They urge that the order is neither final under 28 U.S.C. §1291 nor an appealable collateral order under the exception to §1291 recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Appellees find support for their position in *In Re Grand Jury Proceedings*, 580 F.2d 13 (1st Cir. 1978), where the court found an order denying disclosure of grand jury material to a state investigator to be analogous to a discovery ruling, and thus interlocutory and nonappealable. On the merits, appellees argue that Rule 6(e) is indeed applicable, and that the policy of grand jury secrecy thus precludes disclosure of their records to the Commission.

II. DISCUSSION

A. *Appealability*

We hold that we have jurisdiction to entertain this appeal because the district court's order was entered in an independent, plenary proceeding that conclusively resolved the only controversy between the parties.[3] Accordingly, it is a final order appealable under 28 U.S.C. §1291. *In the Matter of Grand Jury Empanelled Feb. 14,*

3. Rittenhouse and Severance contend that the order is not conclusive because the district court indicated that it might entertain another motion by the Commission offering compelling reasons for overcoming Rule 6(e). A mere suggestion, however, that a court might reconsider an order upon a new and adequate showing does not destroy the final character of the order. *FTC v. Texaco*, 517 F.2d 137, 143 n.6 (D.C. Cir. 1975); reh. en banc, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977). *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), counsels us to construe orders practically, rather than technically, in determining their finality. Thus, we should not invoke the finality doctrine to encourage wasted resources by requiring parties to redo what they have already done before affording them appellate review.

1978, 597 F.2d 851, 857-58 (3d Cir. 1979); *Gibson v. United States*, 403 F.2d 166 (D.C. Cir. 1968).

The motion for disclosure was the sole matter affecting the Commission's rights before the district court, and it was not in any way part of or connected with the grand jury proceeding. The grand jury simply happened to have possession of records also subpoened by the Commission, a separate authority pursuing a distinct inquiry. The Commission's reasons for seeking access are unrelated to the substance of the grand jury's investigation, and it has no interest in the grand jury proceedings except for the somewhat fortuitous occurrence that that body had, for a different purpose, previously acquired custody over the records that it now seeks. For these reasons, the Commission's motion was independent of the grand jury proceedings, and it is therefore irrelevant to the finality of the order of the district court that the grand jury's deliberations are ongoing.[4]

Illustrative of the discrete, and thus final, nature of the district court's order is the fact that an immediate appeal poses no danger of delaying or disrupting the grand jury proceedings. See *Cobbledick v. United States*, 309 U.S. 323 (1940). The grand jury need not suspend its investigation while a recalcitrant witness seeks to appeal an order compelling the production of documents, for the Commission merely requests an opportunity to ex-

4. See *United States v. Calandra*, 455 F.2d 750 (6th Cir. 1972), where Calandra, subpoenaed to testify before a grand jury, moved (a) to suppress certain evidence, and (b) for an order insulating him from answering questions based on the evidence. The district court granted the motion, and the court of appeals proceeded to consider the government's appeal, holding that the motion was a plenary proceeding unrelated to the pending grand jury investigation.

amine and copy the records.[5] The Commission assures us, and there is no contradiction, that the grand jury would be without the documents for a few days only.[6]

The finality of the order below is also evident from the lack of other avenues of review available to the Commission. The Commission does not have the option of putting itself in contempt to gain immediate review, see *Cobbledick v. United States*, 309 U.S. 323, 328 (1940), and if it waits to press an appeal until the conclusion of the grand jury proceedings, its legislative mission will have long since expired, rendering the requested materials useless. See *Perlman v. United States*, 247 U.S. 7 (1918), where the Supreme Court held that an order denying a motion to prevent the production of documents before a grand jury was a final, appealable decision because Perlman had no other means "to avert the mischief of the order." Espousing a flexible concept of finality, the Court indicated that the doctrine should not be used as a means of denying meaningful appellate review.

We are not persuaded by appellee's arguments that *In Re Grand Jury Proceedings*, 580 F.2d 13 (1st Cir. 1978), controls this situation. There, a state investigator who had probed the same charges sought access to the entire proceedings of the grand jury, so that he could assist that body. Central to the court's finding of nonappealability was its conclusion that the disclosure motion was integral to the grand jury investigation, so that the order appealed from was undeniably issued in

---

5. *Cobbledick v. United States*, 309 U.S. 323 (1940), in which the Court held the denial of a grand jury witness' motion to quash a subpoena duces tecum to be nonappealable, is thus inapplicable. In *Cobbledick* the Court was motivated by the need to avoid interruption and delay of the grand jury's work from interlocutory appeals by various witnesses. Since the Commission's motion presents no such danger, the appeal here does not implicate the policy or holding of *Cobbledick*.

6. Letter-brief for appellant, June 6, 1980, at 4.

connection with an ongoing matter. 580 F.2d at 16-17. As we have previously discussed, the Commission's motion here is not connected with the grand jury investigation, but rather constitutes an independent matter.

B. *Applicability of F. R. Crim.P. 6(e)*

In order to accept the argument of Rittenhouse and Severance that Rule 6(e) applies to forbid disclosure of the requested documents, it would be necessary to conclude that the Rule prevents disclosure, *for any purpose*, of documents once they are subpoenaed by a grand jury. We cannot so conclude, however, because the policy of secrecy is not absolute. *United States v. Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied* 440 U.S. 983 (1974). Rule 6(e) shields solely "matters occurring before the grand jury." It is designed to protect from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process. See, e.g. *United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958); *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954). The Rule is not intended "to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury." *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). The mere fact that a particular document is reviewed by a grand jury does not convert it into a "matter occurring before the grand jury" within the meaning of 6(e). Documents such as the business records sought by the Commission here are created for purposes independent of grand jury investigations, and such records have many legitimate uses unrelated to the substance of the grand jury proceedings. See *United States v. Stanford*, supra, at 291.

As the Second Circuit stated in *United States v. Interstate Dress Carriers, supra*, while granting the request of the Interstate Commerce Commission for dis-

closure of a trucking company's records in the custody of a grand jury.

> [W]hen testimony or data is sought for its own sake — for its intrinsic value in furtherance of a lawful investigation — rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same documents had been, or were presently being, examined by a grand jury.

280 F.2d at 54. Thus, once the New Jersey Commission demonstrated a legitimate purpose flowing from its investigatory authority for subpoenaing the records of Rittenhouse and Severance, disclosure should not have been denied simply because a grand jury had reviewed the documents in an unrelated matter. Access to the records should be refused only if it would compromise the secrecy of the grand jury. The district court erred in assuming that Rule 6(e) automatically controlled when it required the Commission to show a compelling necessity for production from the outset. "If the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965). In this instance, where the documents are sought for use in an investigation into a different subject than the matter before the grand jury, the party objecting to production must first prove that the policy of grand jury secrecy would be jeopardized. Otherwise, the request for access is not governed by Rule 6(e).

Because the record before us does not include the documents sought by the Commission, we must leave to the district court the task of evaluating whether disclosure would reveal "matters occuring before," or the content of, the grand jury proceedings. If the district court specifically finds that the secrecy policy of Rule 6(e) is

implicated, only then should the Commission be required to show a "particular need" or "compelling necessity" for disclosure.

III. CONCLUSION

The order of the district court will be vacated and the matter remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE :
: MISC. NO. 79-555
GRAND JURY INVESTIGATION:

O R D E R

AND NOW, to wit, this 5th day of December, 1979, upon consideration of the Request of the New Jersey Commission of Investigation for Disclosure of Grand Jury Documents, it is hereby Ordered that the request is DENIED.

It is likely that the Commission's request meets the requirement of being "preliminar[y] to...a judicial proceeding."[1] Rule 6(e)(3)(c)(i), F.R.Crim.P.; Matter of Disclosure of Testimony Before the Grand Jury, 580 F.2d 281 (8th Cir. 1978). However, the Commission has wholly failed to "show that a 'particular need' exists for the [documents] which outweighs the policy of secrecy." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400(1959). Nor has it shown a "compelling necessity" for disclosure. United States v. Proctor & Gamble Co., 356 U.S. 677,

682(1958). The Commission has averred that the documents are unavailable elsewhere, but in this Court's view, a greater showing of need is required to overcome the grand jury's interest in keeping secret the evidence it is considering. See Matter of Grand Jury, 469 F.Supp. 666, 671 (M.D.Pa. 1978).

AND IT IS SO ORDERED.

/s/
Clarence C. Newcomer, J.

---

1. The record does not reflect whether the Commission's investigations are intended to "culminate" in a judicial proceeding (see Matter of Disclosure, Etc., supra, 580 F.2d at 286), but that omission presumably can be met in a renewed application, if any.